

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

CEDRICK DAMON WASHINGTON,

Defendant.

No. CR 08-295-01-MO

OPINION AND ORDER

MOSMAN, J.,

On January 31, 2011, Mr. Washington moved for modification of his sentence pursuant to 18 U.S.C. § 3582(c)(1) and intervening change in law (#43) in the above-captioned case. For the reasons stated below, I deny Mr. Washington's motion.

BACKGROUND

Mr. Washington was indicted for possessing "5 grams or more" of cocaine base with intent to distribute. (Indictment (#1).) He pled guilty on March 31, 2009. On September 14, 2009, he was sentenced to the statutory mandatory minimum of 60 months imprisonment followed by a four-year term of supervised release.

On August 3, 2010, the Fair Sentencing Act of 2010 (the "Act") was signed into law. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010). This law increased the amount of cocaine base a defendant must carry from 5 grams to 28 grams in order to be sentenced to 60 months of imprisonment. *Id.*; *see also* 21 U.S.C. § 841(b)(1)(B)(iii). Mr.

Washington brings this motion to argue that the Act should be applied retroactively to reduce his sentence.

DISCUSSION

I. The Fair Sentencing Act of 2010 Does Not Apply Retroactively

Modifications to sentencing laws only apply retroactively if that intention is expressly stated in the legislation. 1 U.S.C. § 109. The Fair Sentencing Act of 2010 does not expressly state that it applies retroactively, so Mr. Washington's argument fails. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). While the Ninth Circuit has not addressed the issue in a published opinion, other circuits have found that the Act is not retroactive. *See, e.g., U.S. v. Smith*, 2011 WL 285056, at *3 (8th Cir. 2011).

II. The Fair Sentencing Act of 2010 Has Not Triggered 18 U.S.C. § 3582(c)(2)

18 U.S.C. § 3582(c)(2) gives the court discretion to reduce a prisoner's sentence based on a later reduction in the sentencing guidelines by the Sentencing Commission. The Sentencing Commission has not reduced the sentencing guidelines. U.S.S.G. § 1B1.10(c) Comment 1(A) ("Eligibility for consideration under 18 U.S.C. 3582(c)(2) is triggered only by an amendment listed in subsection (c) [those made by the Sentencing Commission] that lowers the applicable guideline range."); *see also* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 10, 124 Stat. 2372, 2372 (2010).

CONCLUSION

I DENY Mr. Washington's motion without prejudice, so that Mr. Washington can refile this motion if the Sentencing Commission acts.

IT IS SO ORDERED.

DATED this 10th day of February, 2011.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Court